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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MARKEL AMERICAN INSURANCE COMPANY,

No. C-11-2477-DMR

Plaintiff,

v.

JEANNE STOUT, *et al.*,

Defendants.

**ORDER REASSIGNING CASE TO
DISTRICT JUDGE; REPORT AND
RECOMMENDATION TO GRANT
PLAINTIFF'S MOTION FOR DEFAULT
JUDGMENT**

Plaintiff Markel American Insurance Company moves the court pursuant to Federal Rule of Civil Procedure 55(b)(2) for entry of a default judgment against Defendant Robert Gingras, Jr. (“Gingras”). Plaintiff asks the court to declare that Plaintiff has no duty to afford a defense or indemnity to Defendants Jeanne or Jeff Stout (“the Stouts”) under motorcycle insurance policy number MOR00000080036 (“the Policy”) with respect to the lawsuit that Gingras filed against them in the Superior Court of the State of California, Sonoma County, *Gingras v. Polaris Indus., Inc.*, No. SCU 248756 (Cal. Super. Ct. filed Dec. 7, 2010). Because the court has not obtained consent from all of the parties pursuant to 28 U.S.C. § 636, it ORDERS the case reassigned to a District Judge. For the reasons given below, the undersigned recommends that the Court grant Plaintiff’s motion.

I. Background & Procedural History

Plaintiff issued the Policy to the Stouts for their all terrain vehicle (“ATV”), covering the period of January 26, 2010 to January 26, 2011. (Freedman Decl. ¶ 8, Mar. 5, 2012; *see* Freedman Decl. Ex. A (the Policy).) Section III of the Policy delineates the scope of coverage:

1 [Plaintiff] agree[s] to pay damages for Bodily Injury . . . for which the law holds [the
 2 Stouts] responsible because of a Motorcycle^[1] Accident involving an Insured
 3 Motorcycle. [Plaintiff] will settle or defend, as [it] consider[s] appropriate, any claim
 4 or suit asking for these damages. . . .

5 . . .
 6 An Insured Person, as used in this section . . . means: . . . B. Anyone using, with [the
 7 Stouts'] permission or within the scope of [the Stouts'] permission, any Insured
 8 Motorcycle. They will have the same rights and obligations that [the Stouts] have
 9 under this insurance. C. Any person or organization legally responsible for the use of
 10 any Insured Motorcycle as long as such use is with [the Stouts'] permission. They
 11 will have the same rights and obligations that [the Stouts] have under this insurance.

12 (Freedman Decl. Ex. A at 8-9.) Exclusion A excludes from coverage "any Bodily Injury . . .
 13 sustained by any Insured Person." (Freedman Decl. Ex. A at 10.)

14 According to Plaintiff, on February 28, 2010, Gingras, a relative and/or friend of the Stouts,
 15 had an accident while driving the Stouts' ATV with their knowledge and permission. (Freedman
 16 Decl. ¶ 15; *see* Freedman Decl. ¶ 17.) He suffered injury to his arm and brought a negligence suit
 17 against the Stouts for compensation, *Gingras*, No. SCU 248756. (Freedman Decl. ¶ 16.) Among
 18 other arguments, Plaintiff asserts that the policy excludes such coverage because Gingras was
 19 injured while driving the vehicle with the Stouts' permission:

20 Exclusion A of the Liability Coverage Section of the Policy specifically provides that
 21 the Liability Coverage does not apply for any "Bodily Injury" sustained by any
 22 "Insured Person." Because GINGRAS drove the ATV with the permission of [the
 23 Stouts, he] qualifies as an "Insured Person" under the Policy.
 24 GINGRAS is claiming in the *Gingras* Lawsuit that he suffered "Bodily Injury," as
 25 that term is defined in the Policy, as a result of the accident. Because GINGRAS, an
 26 "Insured Person," filed the *Gingras* Lawsuit claiming "Bodily Injury" he sustained
 27 while using the ATV, Exclusion A. [sic] applies to exclude coverage for the
Gingras Lawsuit in its entirety.

28 (Freedman Decl. ¶¶ 18-19.) Consequently, Plaintiff believes that it "does not owe a duty to defend
 or indemnify the STOUTS to the *Gingras* Lawsuit under the Policy." (Freedman Decl. ¶ 22.)

29 Plaintiff filed suit for declaratory relief to that effect on May 20, 2011. [Docket No. 1.] On
 30 October 13, 2011, Plaintiff filed a Request for Waiver of Service signed by Gingras's counsel on
 31 July 5, 2011. [Docket No. 14.] Gingras has not appeared or otherwise participated in this action.
 32 Plaintiff moved for an entry of default against Gingras on December 8, 2011 [Docket No. 24], which
 33 the Clerk of the Court granted six days later [Docket No. 27]. Plaintiff filed this motion for default

1 The Policy's Recreational Vehicle Endorsement deletes the definition of motorcycle and
 2 replaces it with that for an ATV. (Freedman Decl. Ex. A at 4.)

1 judgment on March 5, 2011. [Docket No. 35.] The court held a hearing on April 26, 2012. Gingras
2 did not appear.

3 **II. Default Judgment**

4 **A. Legal Standard**

5 Federal Rule of Civil Procedure 55(b)(2) permits a court to enter a final judgment in a case
6 following a defendant's default. *Shanghai Automation Instrument Co. v. Kuei*, 194 F. Supp. 2d 995,
7 999 (N.D. Cal. 2001). Whether to enter a judgment lies within the court's discretion. *Pepsico, Inc.*
8 *v. Cal. Sec. Cans*, 238 F. Supp. 2d 1172, 1175 (C.D. Cal. 2002) (citing *Draper v. Coombs*, 792 F.2d
9 915, 924-25 (9th Cir. 1986)) ("A defendant's default does not automatically entitle the plaintiff to a
10 court-ordered judgment."); *Shanghai Automation Instrument Co.*, 194 F. Supp. 2d at 999.

11 Before assessing the merits of a default judgment, a court must confirm that it has subject
12 matter jurisdiction over the case and personal jurisdiction over the parties, as well as ensure the
13 adequacy of service on the defendant. See *In re Tuli*, 172 F.3d 707, 712 (9th Cir. 1999). If the court
14 finds these elements satisfied, it turns to the following factors ("the *Eitel* factors") to determine
15 whether it should grant a default judgment:

16 (1) the possibility of prejudice to the plaintiff, (2) the merits of plaintiff's substantive
17 claim, (3) the sufficiency of the complaint, (4) the sum of money at stake in the
18 action[,], (5) the possibility of a dispute concerning material facts[,], (6) whether the
default was due to excusable neglect, and (7) the strong policy underlying the Federal
Rules of Civil Procedure favoring decision on the merits.

19 *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986) (citation omitted). In this analysis, "the
20 well-pleaded allegations of the complaint relating to a defendant's liability are taken as true."
21 *Pepsico, Inc.*, 238 F. Supp. 2d at 1175 (citing *Televideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-
22 18 (9th Cir. 1987)). Nevertheless, default does not compensate for essential facts not within the
23 pleadings and those legally insufficient to prove a claim. *Cripps v. Life Ins. Co. of N. Am.*, 980 F.2d
24 1261, 1267 (9th Cir. 1992).

25 **B. Analysis**

26 The court has subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1332. It
27 exercises personal jurisdiction over Gingras because he is a resident of Rohnert Park, County of
28

1 Sonoma, California. (Compl. ¶ 7.) Gingras properly waived service on July 5, 2011 [Docket No.
2 14]. *See Fed. R. Civ. P.* 4(d)(1).

3 Turning to the first *Eitel* factor, Plaintiff may suffer prejudice if the court does not enter a
4 default judgment against Gingras because Plaintiff will continue to suffer uncertainty that it may
5 have a duty to defend or indemnify the Stouts in Gingras's litigation against them. *PepsiCo, Inc.*,
6 238 F. Supp. 2d at 1177. Plaintiff also fulfills the second and third *Eitel* factors: The complaint lays
7 out a proper argument for obtaining declaratory relief against Gingras. Specifically, Plaintiff seeks a
8 declaration that "Exclusion A. [sic] excludes coverage for the *Gingras* Lawsuit in its entirety," so
9 that Plaintiff is not liable for "damages alleged against the Stouts" and has no duty to defend or
10 indemnify the Stouts in the suit. (Compl. ¶¶ 28-29.) In light of the alleged facts and the pertinent
11 law, Plaintiff has submitted a legally sufficient complaint which will prevail on the merits. *See*
12 *Farmers Ins. Exch. v. Stratton*, 145 Cal. App. 3d 612 (1983); *State Farm Mut. Auto. Ins. Co. v.*
13 *Ammar*, 126 Cal. App. 3d 837 (1982).

14 The fourth factor examines the amount of money at stake. This poses no difficulty for
15 Plaintiff, as it seeks solely declaratory relief rather than monetary damages. *See Round Hill Cellars*
16 *v. Lolonis Winery*, No. 11-757-JSW (EDL), 2011 WL 6961333, at *5 (N.D. Cal. Dec. 9, 2011),
17 adopted by, No. 11-757-JSW, 2012 WL 33247 (Jan 06, 2012). With respect to the fifth prong,
18 Gingras has not appeared in this action, let alone contested any of Plaintiff's material facts. Finally,
19 nothing in the record suggests that Gingras defaulted due to excusable neglect. Plaintiff repeatedly
20 has served him submissions relating to the case throughout the pendency of this action [see Docket
21 Nos. 14, 20, 23, 29-30], and Gingras has failed to participate in the litigation. *Shanghai Automation*
22 *Instrument Co.*, 194 F. Supp. 2d at 1005. Examining these facts in the aggregate, the court finds that
23 the *Eitel* factors outweigh the Federal Rules of Civil Procedure's strong preference for a decision on
24 the merits. The undersigned therefore recommends that the Court grant Plaintiff default judgment
25 against Gingras.

26 III. Conclusion

27 For the foregoing reasons, the undersigned recommends that the Court declare that Plaintiff
28 has no duty to afford a defense or indemnity to Defendants Jeanne Stout or Jeff Stout under the

1 Policy, number MOR00000080036, with respect to the lawsuit Gingras filed in the Superior Court of
2 the State of California, Sonoma County, *Gingras*, No. SCU 248756.

3 Any party may file objections to this report and recommendation with the District Judge
4 within 14 days of being served with a copy. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(a); N.D.
5 Civ. L.R. 72-2. Failure to file timely objections “may waive the right to appeal the District Court’s
6 order.” *IBEW Local 595 Trust Funds v. ACS Controls Corp.*, No. C-10-5568, 2011 WL 1496056, at
7 *3 (N.D. Cal. Apr. 20, 2011).

8 IT IS SO ORDERED.

9
10 Dated: April 26, 2012

